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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-273

MRS. VIOLET M. DERBOFEN, WIFE OF GAIL KREHER, AND MRS. FLORENCE JUNCKER, WIDOW OF DR. JOHN C. DERBOFEN,

Petitioners,

versus

T. L. JAMES AND COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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No.

MRS. VIOLET M. DERBOFEN, WIFE OF GAIL KREHER, AND MRS. FLORENCE JUNCKER, WIDOW OF DR. JOHN C. DERBOFEN,
Petitioners,

versus

T. L. JAMES AND COMPANY, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

Petitioners, Mrs. Violet M. Derbofen, et al pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Louisiana entered in the above case on May 5, 1978.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Louisiana is reported at 357 So.2d 1168. The opinion of the Court of Appeal of Louisiana, Fourth Circuit, is reported at 335 So.2d 963. An earlier opinion of the

Court of Appeal of Louisiana, Fourth Circuit, is reported at 148 So.2d 795. The judgment of the Civil District Court is unreported but submitted as Appendix No. 3, *infra*, at pages 32a-39a.

JURISDICTION

An opinion of the Court of Appeal of Louisiana, Fourth Circuit was entered on December 3, 1962. Rehearing was denied February 4, 1963. As a result of this judgment not being challenged further in the Supreme Court of the State of Louisiana, the adjudication of that court's ruling, which reserved certain rights to the petitioners herein, was final. Subsequently, after trial exercising those rights reserved to petitioners, the judgment of the Civil District Court of the Parish of Orleans was entered on January 13, 1975. The judgment of the Court of Appeal of Louisiana, Fourth Circuit, was entered on October 20, 1977. A timely petition for rehearing was denied March 13, 1978. A timely petition for Writ of Certiorari was denied on May 5, 1978 by the Supreme Court of the State of Louisiana and is final by its terms. As a result of the judgment of the Louisiana State Supreme Court, the adjudication of this matter in the Louisiana Courts is final, and no further review of the merits of the Federal claims made a part of this petition is available in any Louisiana Court.

The jurisdiction of this Honorable Court is invoked under Rules of U.S. Supreme Court, Rule 19.

QUESTIONS PRESENTED

In a tort suit under Louisiana Civil Code Article 2315, petitioners sought recovery of losses incurred as a result of respondent construction corporation's trespass effected by illegally excavating approximately 2½ acres of petitioner's land to make the corporation a lake. This illegal excavation cut the petitioner's property into two separate unrelated pieces of property, divided by the respondent's man-made lake of approximately 35 feet deep. An initial suit awarded the petitioners payment for the dirt removed with the Court of Appeal of Louisiana, Fourth Circuit, reserving rights to the petitioners "to sue for future damages as prayed for in their petition . . ." Damages prayed for in the petitioner's petition referred to sought removal of the lake and restoration of the excavated property to its original contours. After a second trial, timely instituted, to effect the injunction for removal of the lake, or damages in lieu thereof, the trial court awarded petitioners $183,112.30. On appeal by the respondents to the Court of Appeal of Louisiana, Fourth Circuit, the petitioners cross-appealed for specific performance for removal of the lake or in lieu thereof, the uncontradicted, proven cost for its removal in the amount of $1,300,000.00. The Court of Appeal of Louisiana rendered a decree awarding petitioners the amount $1494.00, specifically precluding the petitioner's exercise of the rights reserved to them earlier by the same court, that is, to sue for future damages, rather only having modified an earlier interim award of the price of the dirt. The Supreme Court of the State of Louisiana denied a timely application for a writ of review brought by the petitioners. The questions presented are:

1. WHETHER THE LOUISIANA COURT OF APPEALS' DENIAL OF PETITIONERS' RIGHT TO SUE FOR FUTURE DAMAGES WHICH HAD BEEN RESERVED TO THE PETITIONERS BY THE SAME COURT OF APPEAL OF LOUISIANA WAS A DENIAL OF DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

2. WHETHER THE RIGHT TO SUE FOR FURTHER DAMAGES GUARANTEED BY THE COURT OF APPEAL OF LOUISIANA, FOURTH CIRCUIT, TO THE PETITIONERS, AND THEN TAKEN AWAY DESPITE TIMELY COMPLIANCE IN THE EXERCISE OF THAT GUARANTEED RIGHT, DEPRIVED PETITIONERS OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE BY SUCH STATE ACTION AND SUBSEQUENT "BROKEN PROMISE."

3. WHETHER THE JUDGMENT OF THE COURT OF APPEAL OF LOUISIANA, FOURTH CIRCUIT, WHICH DENIED THE EXERCISE OF PETITIONERS' RIGHT TO SUE FOR FUTURE DAMAGES AS PREVIOUSLY RESERVED BY THE SAME COURT WAS AN *EX POST FACTO* VIOLATION IN CONTRAVENTION OF ARTICLE I, SECTION 10, OF THE UNITED STATES CONSTITUTION.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent portions of Article I, Section 10 and the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

This is not an expropriation case.

The origin of this case dates back to October 30, 1958 when petitioners, Mrs. Violet M. Derbofen, wife of Gail T. Kreher, and Mrs. Florence Juncker, widow of Dr. John C. Derbofen, filed a suit (No. 366-261, Civil District Court for the Parish of Orleans) against T. L. James and Company, Inc., and numerous other defendants no longer involved. It arose out of a tort which occurred in 1956 and 1957 when T. L. James and/or its subcontractor made an illegal excavation which created a lake in the middle of the petitioners' tract, without the petitioners' knowledge or consent. The illegal excavation changed the contour of petitioners' land, which was formerly level, and created a pit of 2.232 acres which T. L. James later made into a lake, cutting out the middle of the petitioner's property.

The lake is deep, with a depth down to thirty-five (35) feet, and with a perpendicular drop-off of twenty-five (25) to thirty (30) feet. It is not contained, protected or enclosed, and constitutes a safety hazard, nuisance and cause of erosion. The petitioners are deprived of the use and enjoyment of their property, part of which is clearly not accessible. Petitioners have sought and

continue to now seek removal of the water, the refilling of their land with suitable material, and the erection of pilings to protect their boundaries from the lake created on the neighboring tract and to restore the land to its original level contour.

In deciding the original suit, the Courts originally awarded petitioners only the value of soil removed by defendants. The Fourth Circuit Court of Appeal of Louisiana specifically emphasized in its opinion (148 So.2d 795 at 797):[1]

> "* * * It will be noted that the petitioners herein in addition to reserving their rights to claim future damages for the continuing trespass, as set forth, also pray that the defendants BE REQUIRED TO REMOVE THE WATER STANDING ON THEIR PROPERTY AND RESERVE THEIR RIGHT TO CLAIM DAMAGES FOR INDEMNIFICATION OF NECESSARY EXPENSES TO BE INCURRED ON ACCOUNT THEREOF IN THE EVENT THE DEFENDANTS FAILED TO DO SO." (Emphasis added).

IN ADDITION, THE COURT OF APPEAL RESERVED THE PETITIONERS' RIGHT TO SUE FOR FUTURE DAMAGES AS PRAYED FOR IN THEIR PETITION. 148 So.2d 795 at 800.

The present suit was filed on December 2, 1963 within the prescriptive period. In addition, exceptions

1 Court of Appeal, Fourth Circuit, December 3, 1962; rehearing denied February 4, 1963. No application for writs was made to the Louisiana State Supreme Court.

granted as to no cause of action were overruled. *Derbofen, wife of Gail Kreher, and Mrs. Florence Juncker, widow of Dr. John C. Derbofen vs. T. L. James and Company, Inc., et al,* 274 So.2d 734 (March 13, 1973).

Petitioners then sought specific performance by the defendants to do that which the defendants have admitted they have failed to do, that is, remove the water, restoration of the original level contour of the property, and protection of it from erosion or indemnification for expenses necessary to be incurred to have this done, as well as damages for loss of use and enjoyment to date.

On December 30, 1968, petitioners filed a Request For Admission of Fact and Genuineness of Documents addressed to T. L. James and Company, Inc., through Charles J. Rivet, Esq., their attorney of record. This was answered on January 31, 1969 wherein T. L. James and Company, Inc., admitted they "have made no effort to remove the water standing on plaintiffs' property." This admission was signed by J. B. Clements and notarized by Paul E. Hurley, Esq. Again, on the trial of the merits on November 25, 1974, T. L. James and Company, Inc., representative George D. Williams, Area Manager, reiterated "that we (T. L. James and Company, Inc.) are not interested in filling the lake."

Still, as of this date, August 18, 1978, no effort has been made by the defendants (respondents) to remove the water from the petitioners' property. See Appendix No. 7 for photograph of existing lake which to this day stands illegally on petitioners' property.

Specific performance was originally prayed for in the original petition of suit No. 366-261, dated October 30, 1958, and reiterated and made a part of the present suit No. 417-884 by reference as though pleaded therein *in extenso*.

In its decision of October 20, 1977, the Court of Appeal of Louisiana, Fourth Circuit, denied the petitioners the hearing on their claim for future damages, rather only modified the original award for dirt removed to an increase of $1494.00.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because the action of the Court of Appeal of Louisiana was so arbitrary and capricious that it denied petitioners of due process.

The Court of Appeal of Louisiana, Fourth Circuit, specifically awarded the petitioners $16,005.00 for the dirt illegally removed from petitioners' property. The court further reserved to the petitioners, "the right to sue for future damages as prayed for in their petition . . ." See 148 So.2d 795 (1962).

However, when the petitioners did in fact (timely) further sue for future damages when the T. L. James and Company, Inc., refused to remove the lake, the same court then refused to hear petitioners complaint in this regard.

Based on the opinion of the Court of Appeal of Louisiana, (See Appendix No. 5, reported at 148 So.2d 795 at

800) the petitioners did not seek an immediate remand for future damages or any other immediate remedy. Rather, they acted within the court's reservation of their rights to sue. When the T. L. James and Company, Inc., did not remove the lake or otherwise attempt to restore the petitioners' property, within the statutory time period, the petitioners exercised their guaranteed rights and sued for specific performance (removal of the lake) or in lieu thereof, damages. They were awarded $183,112.30 in the trial court. When the respondents, T. L. James and Company, Inc., took the matter to the Court of Appeal of Louisiana, that court (by a most curious count of allegedly concurring judges) denied the petitioners' their right to be in that court seeking review of awarded future damages, but did give the petitioners $1494.00 which was described as the difference of the true value of the dirt in year 1957. The court specifically stated the petitioners were entitled *only* to a judgment in the amount of the 1957 value of the property and not for any other damages, despite the court's own judgment earlier which had reserved the right to the petitioners to sue in this regard.

Fundamental fairness is essential to preserve the due process rights of every citizen whether in a state or federal forum. As in the criminal matter, *Santobello vs. New York*, 404 U.S. 257, 30 L.Ed. 427, 92 S.Ct. 495 (No. 70-98) (1971) an agreement, analagous here, between the Court of Appeal of Louisiana and the petitioners that their rights to sue for future damages were in fact reserved, must be honored. It is immaterial that the Court of Appeal of Louisiana later changed its mind or that the breach of agreement was

inadvertent. The case should be remanded to the Supreme Court of Louisiana to make a determination of the validity of the trial court's determination of the future damages sued for, that is the validity of the $183,112.30 awarded or the additur sought on cross-appeal in the amount of $1,300,000.00.

Even if the Court of Appeal of Louisiana acted in error when it initially reserved the right to sue for future damages to the petitioner, by not remanding the case, then and there, for resolution of the future damages (that is, the removal of the lake) it acted in an *ex post facto* fashion, in violation of Article I, Section 10 of the United States Constitution in its subsequent action. The petitioners should have been given the right to be remanded at that time back down to the court which awarded only payment for the dirt removed, for trial on the other damages.

In any event, this Court of Appeal of Louisiana should have honored its own guarantee to the petitioners to sue in this manner.

If that is the law now, after the fact, fine; make it the law. But it is a denial of due process to apply it retroactively and deny the petitioners their right (on which they relied, guaranteed by this same court) to sue.

Admittedly, *ex post facto* law does not apply to the judiciary but the effect in the instant case, as a very practical matter, does have the same result of an unconstitutional *ex post facto* act by the legislature.

In addition, the fragmented Court of Appeal of Louisiana opinions behind its decree, with no single rationale explaining the result, normally would find a position on the narrowest grounds. Compare *Marks vs. United States*, ___ U.S. ___, 97 S.Ct. 990 at 993 (1977). But here, in the instant case there was no clear majority, even on the "narrowest grounds."

Two judges would amend the trial court's award of $183,112.30 to the difference of 1957 value in amount of $1494.00. The other two would increase the trial court award to $199,637.50. The fifth, deciding judge, wrote he would reverse the trial court judgment and dismiss the plaintiffs' (petitioners) suit entirely.

By failure of the Court of Appeal of Louisiana to entertain the petitioners' right to sue for future damages, the petitioners were deprived of something to which they had a right. *Jenson vs. Olson*, 353 F.2d 825 (1965). Due process requires that when governmental agencies or courts adjudicate or make binding determinations which directly affect the legal rights of individuals, they use and stick to procedures which have been traditionally associated with the judicial process. *Amos Treat and Company vs. Securities and Exchange Commission*, 306 F.2d 269, 113 U.S.App.D.C. 100 (1962).

The Court of Appeal of Louisiana inadvertently effected an illegal and unconstitutional act of what amounted to expropriation without due process by denying petitioner right to sue for removal of lake, or in the alternative, for compensatory damages when the court broke its promise to petitioner that she had right to sue for removal of the lake.

The questions presented by this case are of great and recurring significance in the administration of justice. The important nature of these issues have already been recognized by this Court as recently as *Santobello vs. New York, supra*. The serious questions of public policy involved here and the effect of the decision below, if unreversed, upon the judiciary make this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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_____

ABBOTT J. REEVES, ESQ.

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Petition for Writ of Certiorari on Paul E. Hurley, Hurley, McNulty & Stakelum, 2002 Lykes Center, New Orleans, Louisiana 70130, by depositing same in the U.S. Post Office, with adequate postage affixed thereto, this ____ day of August, 1978.

_____

Abbott J. Reeves

APPENDIX 1

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

May 5, 1978

MRS. VIOLET M. DERBOFEN, WIFE OF GAIL T. KREHER, ET AL

versus NO. 62,023

T. L. JAMES AND COMPANY, INC.

In re: Violet M. Derbofen, wife of Gail T. Kreher, et al, applying for Certiorari, or writ of review, to the Court of Appeal, Fourth Circuit, Parish of Orleans.

Denied.

JAD

AT JR

PFC

WFM

JLD

APPENDIX 2

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

MRS. VIOLET M. DERBOFEN, WIFE OF GAIL T. KREHER, AND MRS. FLORENCE JUNCKER, WIDOW OF DR. JOHN C. DERBOFEN

versus NO. 7126

T. L. JAMES & COMPANY, INC., SUCCESSION OF JOE W. BROWN, NO. 368-953, CIVIL DISTRICT COURT, ORLEANS PARISH OF LOUISIANA, MRS. DOROTHY DORSETT BROWN, INDIVIDUALLY AND AS TESTAMENTARY EXECUTRIX OF THE SUCCESSION OF JOE W. BROWN, GEORGE DALLAS WILLIAMS, SABINE DREDGING AND CONSTRUCTION COMPANY, INC., AND T. M. DORSETT

APPEAL FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, NO. 417-884, HONORABLE S. SANFORD LEVY, JUDGE.

HARRY T. LEMMON
JUDGE

(Court composed of Judges L. Julian Samuel, Harry T. Lemmon, John C. Boutall, Patrick M. Schott and Peter H. Beer)

LEMMON AND BEER, JJ., CONCUR IN THE DECREE AND ASSIGN REASONS
SCHOTT, J., CONCURS IN THE DECREE ONLY AND ASSIGNS REASONS
BOUTALL, J., DISSENTS FROM THE DECREE AND ASSIGNS REASONS
SAMUEL, J., CONCURS IN PART AND DISSENTS IN PART AND ASSIGNS REASONS

LEMMON AND BEER, JJ., VOTE TO AMEND AND AFFIRM ON THE MERITS AND ASSIGN REASONS
BOUTALL, J., VOTES TO AFFIRM AND AMEND ON THE MERITS AND ASSIGNS REASONS
SCHOTT, J., DISSENTS ON THE MERITS AND ASSIGNS REASONS

JOHN M. MAMOULIDES, GAIL T. KREHER AND ABBOTT J. REEVES
Attorneys for Plaintiffs-Appellees

HURLEY, McNULTY & STAKELUM
(Paul E. Hurley and P. J. Stakelum, III)
Attorneys for Defendants-Appellants

AMENDED AND AFFIRMED

DECREE

Filed: Oct. 20, 1977

The result of the attached opinions, stating the votes of the members of the five-judge panel on the merits of this case and the reasons therefor, is a judgment for

plaintiffs in the amount of $1,494.00, plus legal interest from October 30, 1958, and all costs in both courts.

/s/ HTL

/s/ PMS

/s/ PHB

LEMMON AND BEER, JJ., CONCUR IN THE DECREE AND ASSIGN REASONS

The members of the five-judge panel have taken different points of view as to why the five votes (stated in the attached opinions on the merits) result in a judgment for plaintiffs in the amount of $1,494.00. We therefore state our reasons for agreeing or disagreeing with the decree separately from our divergent opinions on the merits of the case.

A defendant had appealed from a judgment for plaintiffs in the amount of $183,112.30. On appeal we (Judges Lemmon and Beer) voted for judgment for plaintiffs in the amount of $1,494.00, Judges Samuel and Boutall voted for judgment for plaintiffs in the amount of $199,637.50, and Judge Schott voted for judgment for defendant.

In our view there are two reasonable approaches to the decision that these votes result in the stated decree. One point of view is that since defendant sought relief by appeal, the effect of Judge Schott's vote, combined with our votes, is to grant that relief, at least to the ex-

tent of a reduction of $181,618.30. Under this view the effect of Judge Schott's vote for the ultimate reduction (to zero) resulted in three votes concurring to reduce by $181,618.30 to $1,494.00, since a vote for a greater reduction encompasses a vote for a lesser reduction.

The other point of view is that there are four votes to award a judgment to plaintiffs, and the effect of the votes of Judges Samuel and Boutall to award judgment in the amount of $199,637.50, combined with our votes, is to award a judgment of at least $1,494.00, since a vote for a greater award includes by inference a vote for at least the lesser award.

Either point of view appears plausible to us. We agree that the result of our votes is a judgment for plaintiff for $1,494.00, and it matters not whether one voter believes another's vote caused this result. There is no doubt as to the decree, and the disagreement as to why this decree resulted from the votes does not affect the decree itself.

SCHOTT, J., CONCURRING IN DECREE ONLY

Because this court is required to sit in panels of at least three judges and five under the circumstances present in this case, and because a majority must concur to render a judgment, Art. 5, § 8, Constitution of 1974, we are presented with somewhat of a riddle in deciding what decree has emerged from the diverse opinions of the judges who have participated in the case.

The judgment of the trial court is in favor of plaintiffs and against defendants for $183,112.30. I would reverse this judgment and dismiss plaintiffs' suit. All of my colleagues agree that the judgment should be affirmed but two would amend the amount to $1,494.00, while the other two would amend the amount to $199,-637.50. Since the lesser amount is included in the greater, all four concur in an award of $1,494.00.

Nevertheless, Judges Samuel and Boutall will not sign the decree awarding plaintiffs $1,494.00, and while they have espoused good reasons for this decision I submit with all due respect to my colleagues that they are in error. In my opinion, by their decision, Judges Samuel and Boutall have unintentionally concurred in the award made by Judges Lemmon and Beer for $1,494.00, and that has become the judgment of the majority of this court.

The result reached in this case is indeed bizarre with the one judge of this court who would reverse the judgment of the trial court and dismiss plaintiffs' suit, being required to join in a decree which effectively affirms the judgment of the trial court. But I perceive the effect of the judgment of two of my colleagues differently then they do. The case must be decided by the court of which I am a member, and it is the decree of the court in which I concur, although I am convinced that my basic position is correct, i.e., the judgment should be reversed and plaintiffs' suit dismissed.[1]

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1 A similar, though less complicated, problem existed in *Lowe v. Gentilly Dodge, Inc.*, 342 So.2d 123 (La. App. 4th Cir. 1977). See footnote 2 on page 1234.

BOUTALL, J. DISSENTING FROM DECREE

The result of our consideration of this case before a 5 man panel is that 2 judges would decrease the award in plaintiff's judgment, 2 judges would increase the award, and 1 judge would reverse the judgment, granting plaintiff nothing. The Constitution of 1974 Art. 5 §8 (B) requires "a majority must concur to render judgment." Is there such concurrence here?

In all cases before the courts of appeal the basic inquiry is whether the trial court judgment is correct. This judgment can only be modified or reversed by a majority vote. When a judgment is modified by the Court, the starting point of the modification is the judgment itself. Thus, when the judgment awards money and the modification is quantum, an effective decree is produced when a majority concurs at the least amount of the reduction or the least amount of the increase. See for example Lowe v. Gentilly Dodge, Inc., 342 So.2d 1231 (La.App. 4th, 1977). To some degree this principle supports the same basic principles behind cases like Coco v. Winston Industries, Inc., 341 So.2d 332 (La.1976) in the setting of damages.

In this case it could be said that 4 judges have concurred that plaintiff is entitled to recover, but what shall he recover? Here, 2 judges have said the award shall be decreased and 2 have said the award shall be increased. The disparity in the amounts of award is not simply a dispute over discretionary general damages as per C.C. Art. 1934 (3), but is caused by dispute over the legal basis for setting the award. Thus I say that I do not concur in the proposed decree and that

this case should be placed before the court en banc for consideration. The amount I would award is so close to the trial judgment that I could conscientiously affirm it, but I cannot concur in the proposed decree.

Prior constitutional provisions have provided methods of appointing other judges or attorneys in order to arrive at a majority concurring. Our present constitution does not so provide but neither does it limit us to panels of three judges or five judges. Under our inherent powers we can sit en banc and hopefully reach a majority. See Dauzat v. Allstate Insurance Co., 257 La.349, 242 So.2d 539 (La.1970).

However, three judges have now concurred in a decree for expressed reasons, so that the constitutional mandate has been fulfilled. While I do not approve of the third judge's reasons, I do commend him for moving this ancient case forward to final resolution.

SAMUEL, J., CONCURRING IN PART AND DISSENTING IN PART

I agree with the reasons expressed and the conclusions reached in the "Affirming and Amending on the Merits" opinion of Judge Boutall. Accordingly, I concur in the majority decree that plaintiffs are entitled to recover additional damages, but I dissent from that portion of the now majority decree which awards only $1,494 as I would set those damages at $199,637.50 as does Judge Boutall.

In addition, because my fellow judges on the panel have stated their views as to what the decree would be if Judge Schott had not concurred in the now majority decree and despite the fact that such opinions are dicta, I feel it necessary to give my own views on that question.

With reference to the Louisiana Courts of Appeal, Article 5, Section 8 (B) of our 1974 Constitution specifically provides that a majority of the judges sitting in any case "must *concur* to render judgment" (emphasis added). As I see it, "concur" means and requires an affirmative action on the part of the concurring judge.[1] In other words, in order for a judge to concur in a decree he must affirmatively say he concurs. Thus, when the conclusions of this five judge panel were two for a $199,637.50 award, two for a $1,494 award and one for no award, the result was no judgment at all. Certainly, it cannot be said that I concurred in a decree awarding $1,494 because in my opinion the award should be $199,637.50 simply because the greater includes the lesser, or on any of the other various views expressed by my colleagues, when I did not concur in the lesser amount and actually dissented therefrom. The decree in this case is now a majority decree and the judgment of the court simply because Judge Schott has stated he concurs in the $1,494 award, a concurrence deserving commendation because it brings this too long delayed matter to an end as far as this court is concerned.

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1 In this connection see Black's Law Dictionary 4th Ed. Rev. 363 "concur" and W. & P., 588, 589, "concur" and "concurrence".

ON THE MERITS

LEMMON AND BEER, JJ., AMENDING AND AFFIRMING ON THE MERITS

This litigation involves a trespass by agents of T. L. James & Company onto plaintiffs' property in the course of dredging operations. This suit is the second filed by plaintiffs, and this appeal is the third time the matter has come before this court. Although the record is voluminous, the facts pertinent to this appeal are virtually undisputed, and the issues now before us are essentially legal ones, being (1) whether the plaintiffs under the circumstances of this case can recover an additional award in this second suit after a judgment in the first suit has already granted an award for the trespass, and (2) if so, the proper method of determining the amount of the award.

Facts

In the early 1950's plaintiffs owned a five-acre tract of land, known as Grove 57, in eastern New Orleans. The land was generally low and subject to tidal overflow, and the area was largely uninhabited.

Having contracted to construct the base for Interstate Highway 10 in the vicinity of Grove 57, T. L. James negotiated an agreement with the owner of an adjoining tract of land, who desired to have a lake dug on his property. The contractor dredged the lake in 1957 and utilized most of the excavated material in the construction of the road base, compensating the owner for the material on an agreed basis. During the course

of the dredging, the contractor inadvertently dredged completely across the center of Grove 57, excavating about 80,025 cubic yards of fill material over a surface area of 2.236 acres.

When plaintiffs learned of the trespass, they filed a suit in 1958, seeking to recover damages itemized (1) for removal of the soil at an asserted price per yard, (2) for destruction of trees and vegetation, and (3) for loss of use and enjoyment, reserving the right "to claim future damages for the continuing trespass". The suit also demanded that the court order T. L. James to restore the property to its former condition, reserving the "right to claim damages for indemnification of necessary expenses to be incurred on account thereof in the event of defendants' failure to so do".

The trial court found the admitted trespass was in good faith and rendered a judgment for $6,044.00 against T. L. James. Noting that the sole issue was the quantum of damages to be awarded for the trespass, the court awarded damages based on "the difference in the market value of the property as a whole before and after the injury".[1]

Plaintiffs appealed, and this court granted a higher award, taking a different view of the measurement of damages. After mentioning plaintiffs' request for restoration of the property (noting "they have asked for no alternative moneyed judgment for this") and their two reservations of "rights", the court concluded

1 An expert appraiser estimated the value of the entire Grove 57 before the trespass at $17,500.00 and the value of the two parcels separated by the lake after the trespass at $11,456.00. The difference, $6,044.00, was the amount of the award.

"the only item of damages we can consider is the value of the dirt in place on plaintiffs' property at the time it was removed".[2] (Emphasis supplied) The court then awarded plaintiffs 20 cents per yard, or $16,005.00, based substantially on T. L. James' net profit on the dirt removed in the entire project. The court further amended the judgment to reserve "plaintiffs' right to sue for future damages as prayed for in their petition . . . ." See 148 So.2d 795 (1962).

After applying unsuccessfully for a rehearing, plaintiffs did not seek review of our judgment, but immediately filed the present suit, alleging they had been "damaged by the continuing trespass" and claiming "damages for indemnification for necessary expenses to be incurred" for removal of the water and restoration of the original contour, for engineering and other fees, and for loss of use to date.

After extensive periods with little action, an exception of prescription was filed and was maintained by the trial court. On appeal from the judgment maintaining the exception, this court reversed, holding that since the same cause of action was asserted in each suit, prescription had been interrupted by the filing of the first suit.[3] See 274 So.2d 734 (1973).

On remand, the case was tried on the merits, and in December, 1974 judgment was rendered against T. L.

2 The court noted that the two other items of specified damages (destruction of trees and loss of use) were not proved.

3 This court specifically declined to consider exceptions of res judicata and judicial estoppel, which had been overruled earlier by the trial court.

James. The trial court, reasoning that plaintiffs "have the right to damages for the trespass" and that the trespass had continued up to the date of trial, determined that those damages should be measured by the 1974 value of the portion of Grove 57 injured by the 1957 dredging. Since 97,400 square feet of Grove 57 was covered by water and since fully developed estate sites in the prestige subdivision then surrounding Grove 57 sold for as high as $1.88 per square foot, the court set the damages at $183,112.30.[4]

That judgment is now before us for review.

Continuing Tort

The trial court erred in finding that a continuing trespass existed 17 years after the dredging operations were completed.

A continuing tort is one in which the damage-causing act continues over a period of time.[5] DiCarlo v. Laundry & Dry Cleaning Service, 152 So. 327 (La. 1933). A continuing trespass must be distinguished from a trespass which causes continuing injury by permanently changing the physical condition of the

4 Between the 1957 trespass and the 1974 trial, a national real estate developer had purchased considerable acreage in eastern New Orleans, including tracts on all sides of Grove 57. The surrounding acreage was developed into Lake Forest Estates No. 1 and No. 2, the latter including lakefront lots which sold from $25,000.00 to $38,000.00 depending upon size and location. The subdivisions contained paved streets, utilities and country club facilities. The highest priced of the fully developed lots sold for $1.88 per square foot, or about $350.00 per front foot.

5 In the present case, where the dredging on Grove 57 took place over a number of weeks, there was a continuing tort until the dredging was concluded.

land. See Restatement, Second, Torts §162, Comment e (1965).

When a trespass which permanently changes the physical condition of the land is concluded, no additional causes of action accrue merely because the damage continues to exist or even progressively worsens. Griffin v. Drainage Commission, 34 So. 799 (La. 1903). The problem in this case, therefore, is one of measuring damages at the time the dredging operation was concluded, and not one of assessing damages for successive causes of action accruing because of a continuing tort.[6]

We conclude that there was no continuing tort in this case after the dredging operation was completed. Plaintiffs' right to recover an additional award in this suit therefore depends upon the effect of the reservation of rights recognized by the prior panel of this court.

Exceptions of Res Judicata, Estoppel by Judgment and Improper Division of an Obligation

T. L. James initially reurges its exceptions which were overruled by the trial court.

For the exception of res judicata to apply, the demand must be between the same parties and founded

6 In this respect we distinguish those cases in which the defendant's trespass continues because the offending object (such as a building) remains on the premises. See Prosser, Law of Trots, Ch. 3, §13, p. 74 (4th ed. 1971). The present case involves permanent injury to the land as a consequence of a tort which was completed in 1957.

on the same cause of action, and the thing demanded must be the same. C.C. art. 2286.

Concededly, the demand in this case is between the same parties who were involved in the earlier action. Since we have concluded there was no continuing tort beyond 1957, the test of identity of causes of action is also met.[7] Finally, the thing demanded in both suits was reparation of tort-caused injury, and it would appear at first blush that relitigation of that demand is barred by res judicata.

As to the tort obligation, C.C. art. 2315 obliges him whose fault caused damage to repair it. Plaintiffs' petition in the first suit itemized only some of the cost of reparation due under the tort obligation imposed on T. L. James by C.C. art. 2315, but failed to itemize a cost for restoring the property, attempting instead to reserve the right to demand this item of damages later.[8]

However, at the first trial the pleadings were expanded when both parties introduced evidence without objection as to the cost of restoring the property to its original condition. Either the trial court (under C.C.P. art. 862) or the appellate court (under

7 This is the very basis upon which this court reversed the judgment maintaining the exception of prescription in the prior appeal in the present suit.

8 This pleading thus violated C.C.P. art. 425's prohibition of an obligee's dividing an obligation for the purpose of bringing separate actions on different portions of the obligation. The public policy purpose of the article (and of the doctrines of res judicata and estoppel by judgment) is to avoid a multiplicity of suits and to prevent harassment, delay and undue expense caused by multiple suits.

C.C.P. art. 2164) could have decided the issue of whether plaintiffs should be awarded the cost of restoration as an item of damages. However, this court did not either grant or deny recovery of the cost of restoration, but specifically declined to adjudicate that issue, although it was properly before the court.[9] Furthermore, in the decree this court reserved "plaintiffs' right to sue for future damages as prayed for in their petition".[10]

Considered together, this court's refusal to adjudicate the issue and our reservation of plaintiffs' rights "prayed for in the petition" could reasonably have led plaintiffs to believe that they had the option of seeking certiorari or of filing an itemized demand for the cost of restoration by either a supplemental petition or a second suit.

Res judicata cannot apply to issues which a previous panel of this court has refused to adjudicate, and it would be patently unfair for this panel to apply the doctrine of res judicata. Because of these unusual

9 The court's recognition of plaintiffs' right to later claim recovery of this item effectively permitted an improper division of an obligation.

10 In the prayer of their petition plaintiffs not only reserved the right to claim future damages for a continuing trespass (a claim which had no legal basis), but also reserved the right to seek indemnification of the cost of restoration (a claim which did have a legal basis and should have been asserted and determined in the prior suit).

Because of this court's discussion of both reservations in the opinion, we broadly construe the reservation in the decree to apply to both reservations in the petition, although we believe the proper procedure would have been to avoid piecemeal litigation and to decide the entire case or remand the entire case.

circumstances, we reluctantly conclude that the exceptions were properly overruled.

Method of Determining Award

Plaintiffs argue that under C.C. art. 508 they had the right to demand "demolition of such works", and they contend the article gives them the right to demand removal of the lake and restoration of the property to its original condition.[11]

We reject the applicability of C.C. art. 508, which is found in Title II — Of Ownership, Chapter 3 — Of the Right of Accession to What Unites or Incorporates Itself to the Thing, and Section 1 — Of the Right of Accession in Relation to Immovables. This case does

11 C.C. art. 508 provides:

"When plantations, constructions and works have been made by a third person, and with such person's own materials, the owner of the soil has a right to keep them or to compel this person to take away or demolish the same.

"If the owner requires the demolition of such works, they shall be demolished at the expense of the person who erected them, without any compensation; such person may even be sentenced to pay damages, if the case require it, for the prejudice which the owner of the soil may have sustained.

"If the owner keeps the works, he owes to the owner of the materials nothing but the reimbursement of their value and of the price of workmanship, without any regard to the greater or less value which the soil may have acquired thereby.

"Nevertheless, if the plantations, edifices or works have been made by a third person evicted, but not sentenced to make restitution of the fruits, because such person possessed *bona fide*, the owner shall not have a right to demand the demolition of the works, plantations or edifices, but he shall have his choice either to reimburse the value of the materials and the price of workmanship, or to reimburse a sum equal to the enhanced value of the soil."

not involve the right of accession, and neither is the ownership of the lake involved. In our view this case involves reparation of tort-caused damages to property.

The basic concept of tort reparation required by C.C. art. 2315 is that the tort victim should be restored, as nearly as possible according to the particular circumstances of each and every case, to the position he enjoyed prior to the tort-caused damage. No hard and fast rule can be formulated for reparation of every tort victim, and each case must be decided equitably under its own particular facts and circumstances.

In the present case plaintiffs (and the heirs of some plaintiffs) had purchased the five-acre tract of land as an investment, and at the time of the tort plaintiffs were still holding the land for investment purposes. None of the plaintiffs had ever seen the land prior to the tort because of the physical character of the general area in which the land was located. Significantly, there was a considerable amount of similar undeveloped land in the area which was on the market at the time and available for investment purposes.

Under these circumstances we believe that the damage to plaintiffs' investment property could most justly be repaired by awarding the full value of the virtually destroyed property so that plaintiffs could replace their land held for investment with other similar land in the area, which they could likewise hold for in-

vestment.[12] Additionally, plaintiffs would be entitled to any other damages sustained, such as loss of use during a reasonable period to allow replacement, but no such damages were proved in this case.[13]

Therefore, as of the date of judicial demand, October 30, 1958, T. L. James was obliged (if ultimately cast in judgment) to pay plaintiffs the 1957 value of the property. Because of the peculiar procedural circumstances of this case, that obligation still remains unpaid in part. Nevertheless, although the value of property in this area has become greatly enhanced, plaintiffs are not entitled to an award of the enhanced value

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12 We specifically do not intend to limit damages caused by trespass to the value of the property. The method of reparation used in this case will not achieve justice in all cases of tort-caused damage to land, and the total cost of restoration will sometimes be the proper method of reparation. However, the 1957 cost of restoration (which expert testimony established at almost $200,000.00) is totally unrealistic in this case. It is absolutely inconceivable that plaintiffs, if they had been awarded the cost of restoration at the time of the tort in this case, would have used an award in that amount to restore the property. This consideration alone suggests that the cost of restoration is not the proper method of restoring the tort victim to the position he enjoyed before the trespass.

If the property could have been restored for $36,000.00 (as asserted by T. L. James' unacceptable evidence in the first trial), there would be a much stronger argument for cost of restoration as the proper method of reparation, even though that cost exceeded the value of the property. If plaintiffs lived on the property, our decision might be different. But our decision as to method of reparation is based on consideration of all existing facts.

13 For an intentional trespass plaintiffs would also be entitled to an award for mental anguish, which is considered as compensatory damages in intentional trespass cases. Fassitt v. United T.V. Rental, Inc., 297 So.2d 283 (La. App. 4th Cir. 1974); Loeblich v. Garnier, 113 So.2d 95 (La. 1959); Grandeson v. International Harvester Credit Corp., 66 So.2d 317 (La. 1953). In this case, however, the court in the original proceeding found the trespass was unintentional, and we decline to readjudicate that issue.

of the property because T. L. James failed to pay the cost of reparation upon judicial demand and prior to judgment.[14] While plaintiffs are entitled to interest from the date of judicial demand, they are entitled to judgment only in the amount of the 1957 value of the property. Of course, T. L. James is entitled to a credit for the amount previously paid in accordance with an earlier judgment of this court awarding partial reparation.

The value of the property in 1957 was $17,500.00.[15] The previous award by this court was $16,006.00. Accordingly, the judgment in this case should be the difference between the two sums, or $1,494.00, plus interest from the original date of judicial demand.[16]

We vote to render judgment accordingly.

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14 We note that a similar enhancement in value probably has occurred in other property in the area which could have been bought to replace this virtually destroyed property.

15 We have doubts as to the validity of the appraisal which established this value, because market value is affected by events such as the beginning of the construction of an interstate highway in the area, and the appraisal did not reflect this anticipated increase in market value on the investment property. However, this was the only appraisal which was presented at the original hearing, and the trial court accepted this appraised value as the value of the property. We accordingly decline to reinquire into the value of the property in 1957.

16 We also note that in the earlier decision of this court on the exception of prescription, we held that prescription was interrupted by the original demand. This consideration strengthens our conclusion that the proper method of reparation is by the reference to the 1957 value rather than the 1974 value of the property.

BOUTALL, J. AFFIRMING AND AMENDING ON THE MERITS

I would affirm the judgment appealed as to plaintiffs' right to recover damages, but I disagree with the basis of the award and would amend the judgment only to increase the amount awarded.

The basic issue in this case is the right of an owner of immovable property to compel a trespasser to take away or demolish a structure installed by the trespasser and the measure of damages for failure to do so under the provisions of Louisiana Civil Code Article 508. The issue has been compounded by the various pleadings and procedural steps as set out in the majority opinion.

There is no need here to recount these events, and I refer to the opinion authored by Judge Lemmon as well as our prior opinions in Derbofen v. T. L. James & Co., 148 So.2d 795 (1962) and Kreher v. T. L. James & Company, Inc., 274 So.2d 734 (1973). Suffice it to say that in the original petition filed by plaintiffs there were allegations in support of a prayer for relief requiring that the defendants remove the lake built upon plaintiffs' lands, and that, upon defendants' failure to remove the lake, monetary damages be assessed.

In our 1962 decision, at 148 So.2d 797, the court made the following statement:

> "It will be noted that the plaintiffs in addition to reserving their rights to claim future damages for the continuing trespass, as set

> forth, also pray that the defendants be required to remove the water standing on their property and reserve their right to claim damages for indemnification of necessary expenses to be incurred on account thereof in the event the defendants failed to do so. They have set no monetary value on this and pray for none."

In that same 1962 decision, at page 800, the decree reads:

> "For the reasons assigned, the judgment of the lower court is amended by increasing the award to plaintiffs to $16,005, and by further reserving plaintiffs' right to sue for future damages as prayed for in their petition; in all other respects the judgment is affirmed."

A reading of that judgment, emphasized by the above quotations, makes it clear that the reservation of plaintiffs' right to sue for future damages included not only future damages for continuing trespass but also plaintiffs' right to claim damages for indemnification of necessary expenses to be incurred in the event defendants failed to remove the water standing on their property.

Neither form of relief is now banned, as defendants argue, by either res adjudicata or estoppel by judgment. Neither party to that appeal applied for writs of certiorari or review to the Supreme Court and that judgment became final and definitive, acquiring the authority of the thing adjudged. C.C.P. Article 1842.

Since the parties in that appeal are also the parties presently before the court, that judgment became the law of the case controlling the litigation between the parties. Day v. Campbell-Grosjean Roofing & Sheetmetal Corp., 260 La. 325, 256 So.2d 105 (La.1972). It would be an evident injustice to prevent plaintiffs from prosecuting those rights which they had in the first case and urged before the court, when the court, instead of ruling directly upon that issue, reserved their right to seek damages anew.

Despite allegations of continuing trespass to plaintiffs' land and mandamus to order removal of the water, plaintiffs' rights are encompassed by the provisions of Louisiana Civil Code, Article 508. The facts are simply that a contractor entered a contract with an adjoining land owner to remove soil from a certain portion of that land owner's property and create a lake for his enjoyment. The edge of the lake was dug in such a manner that it proceeded through the middle of the plaintiffs' tract of land and protruded into property on the other side. Plaintiffs had the perfect ownership of the violated property, and as such had the right to use and enjoy it in the most unlimited manner. Civil Code Article 491. Ownership of the land carries with it the ownership of all that is directly above and under it. Civil Code Article 505. This article accords to the owner the right of constructing below the soil all manner of works, digging as deep as he deems convenient, and to draw from these constructions all the benefits which may accrue. All the constructions made within the soil are supposed to be done by the owner. Article 506.

When a third person makes such constructions, the owner of the soil has the right to keep them or compel this person to take away or demolish the same. Article 508. In accordance with that article if the owner requires the demolition or removal, this shall be accomplished at the expense of the person who made the construction without any compensation, and such person may be sentenced to pay damages, if the case require it, for the prejudice which the owner of the soil may have sustained.[1] The construction of a lake upon the property of plaintiffs is encompassed within the provisions of the above cited articles. The owners are thus accorded the right to demand its removal or compensation for the necessary expenses which may be required to remove it. The owners cannot be required to keep the construction upon their property in derogation of our Codal law. They have a right to the full enjoyment and use of the property and cannot be compelled to use a portion of it as a lake against their wishes.

The position taken by two judges herein is that the landowners are only entitled to damages commensurate with the value of the property. While tortious acts of man may require reparations under Civil Code Article 2315, which have been limited to value of replacement in fungible items, this is not such a case. Article 508 requires removal and damages, not compensation of value. To hold that an owner is entitled only to compensation to the extent of the value of the property is to require that he use his property only as someone else should dictate to him, and amounts to a

1 See Esnard v. Cangelosi, 200 La. 703, 8 So.2d 673 (1942); Barker v. Houssiere-Latreille Oil Co., 160 La. 52, 106 So. 672 (1925).

taking of property in violation of Constitution of 1921, Article 1, §2. Private property cannot be taken or damaged except for public purposes. In our 1962 decision, we pointed out that the trial court was in error in considering the market value of the property in its determination of loss. A private individual or corporation such as defendant here has no expropriation authority permitting it to pay value of real estate taken contrary to the owners' wishes. There is no basic difference between a third party coming upon an owner's property and erecting a building above ground which would deprive him of use of half of his property or constructing a lake which deprives the owner of the use of half of his property. In either case the owner has an absolute right of requiring removal or expenses of removal in the event of failure to remove.

The defendants have refused to remove the lake they have constructed, and the only apparent basis for their refusal to do so is the expense involved. The original dredging of the lake occurred some time in 1957, suit was filed in 1958, and the matter has been dragging through the courts ever since. The record reflects the enormous increase in the cost of restoring the property from that time down to the latest trial from which this appeal springs. However, the owners are prevented from obtaining present day expenses for two reasons; 1.) an injured person must mitigate his damages and thus he cannot wait a long period of time after his demand of restoration so that his damages would increase; and 2.) a large part of the elapsed time was due to voluntary negotiations between the parties, and plaintiffs may not take advantage of their voluntary granting of negotiating time. The expense of restora-

tion in this case should be fixed at the time of the original demand.

The record discloses sufficient evidence to make this determination, there having been a vast difference between the owners and the defendants as to the amount necessary to restore the property. The owners introduced evidence to show that restoration would require the placement of 162,666 cubic yards of fill at $1.41 per cubic yard, plus $17,000 for the work required to shape the fill into place or a total cost of $246,359.04. The defendants on the other hand have introduced evidence to show that 125,000 cubic yards of fill were necessary at a cost of $36,000 (presuming free fill obtainable).

The proposition put forth by T. L. James was based upon availability of its equipment in the area and its ability to obtain free fill from an adjoining landowner. Its proposition cannot be considered as a true basis for costs of a restoration that it will take no part in. Instead, the record discloses that T. L. James's contract for furnishing the excavated fill to the highway department at $1.50 per cubic yard cost it $1.4611 per cubic yard. Using these figures for yards of fill and costs, a more accurate and realistic amount of cost is $182,637.50, to which should be added the $17,000 deemed necessary by plaintiffs for handling of the fill, or a total of $199,637.50.

The major difference between these two totals is the amount of fill necessary. While there is no disagreement basically as to the amount necessary to fill the hole on plaintiffs' property, the difference arises

because of the angle of slope or repose necessary to hold the fill in place against continued wave wash from the lake. There is no evidence showing the lesser protection plan of defendants to be inadequate. Thus, I would fix the amount necessary to remove the illegal structure at $199,637.50. In view of our prior decision, I would fix interest at the legal rate beginning with the judicial demand in the present suit.

SCHOTT, J., DISSENTING

I would not allow plaintiffs to recover under either one of the theories adopted by my colleagues because the exception of res judicata bars plaintiffs from such recovery.

When this case was before this court the last time, 274 So.2d 734, the court discussed the merits of defendants' exception of res judicata at p. 739, and declined to pass on the exception because the appeal was limited to one from a judgment on an exception of prescription and in any event there was no evidence relative to the exception of res judicata. The court said:

> ". . . Under these circumstances a determination of those exceptions [judicial estoppel or res judicata] at this time would require speculation on our part. Facts established on the trial of the merits might bar plaintiffs from *some of the items of damages they claim* and such facts are not sufficiently apparent on the record before us." (Emphasis supplied)

Two of my colleagues would award plaintiffs the cost of removal of the water from and restoration of the contour of their land. Significantly they arrive at the amount of damages based upon the evidence taken at the first trial of this case which was on appeal to this court in 1962, 148 So.2d 795. My colleagues would now award to plaintiffs the very same amount which plaintiffs sought and which this court in 1962 declined to award.

A review of that first case shows that plaintiffs sought to recover three items of damage: First, the removal of dirt from their land; second, the destruction of vegetation and trees; and third, deprivation of the full use and enjoyment of the premises to that date. The court found that the evidence was insufficient to support an award to plaintiffs for the destruction of vegetation and trees. As to the deprivation of the full use and enjoyment of their premises, the court noted that plaintiffs did not allege that they were deprived of any of their property but only that a large portion of their property was covered by a lake. The court further noted that plaintiffs did not ask for severance damages or for damages by reason of a diminution in value of their property. They did ask that defendants be enjoined to remove the water standing on their property, but they asked for no alternative monied judgment for this item. All of the evidence as to the amount of money it would have taken to restore plaintiffs' property was then before the court, but the court declined to make the award because plaintiffs had failed to ask for this alternative relief. The court then concluded that "the only item of damages we can consider is the value of the dirt in place on plaintiffs' property at the time it was removed."

By taking this action it appears to me that the court effectively adjudicated plaintiffs' rights with respect to any and all then existing and present damage which plaintiffs suffered. As a consequence, the court decreed that plaintiffs were entitled to an award of $16,005 for the value of the dirt removed, and the decree included the reservation in plaintiffs' favor "reserving plaintiffs' right to sue for future damages as prayed for in their petition."

I would paraphrase this decree as reserving to plaintiffs the right to sue for those damages which they would suffer in the future but limited to the extent that they prayed for such future damages in their petition. By reference to their petition, plaintiffs prayed as follows:

> ". . . and reserving the right to petitioners herein to claim future damages for the continuing trespass as set forth above, and that defendants herein be required to render and make petitioners' property safe and secure from future damage, and to remove water standing thereon, and generally undo the wrong which they have done, reserving to petitioners their right to claim damages for indemnification of necessary expenses to be incurred on account thereof, in the event of defendants' failure to do so; . . ."

In the first place, the presence of the lake on plaintiffs' property with the damage they suffered by reason of defendants' failure to remove the lake had already occurred, and it could not become a future

damage when it was already in existence. The reservation in plaintiffs' petition was one to claim future damages and this reservation was recognized by this court in the first case before us. Assuming that this case is governed by LSA-C.C. Art. 508 and that the lake on plaintiffs' property is equivalent to the "works" discussed in the article it seems that plaintiffs' claim for the expense of removal of the lake had already accrued when the first case was decided. Defendants had already declined to remove the lake and plaintiffs were already entitled to a judgment for the expense of such removal. When the case was before this court the first time, under Art. 508 plaintiffs were already entitled to collect the amount which my colleagues would now award. Because plaintiffs failed to apply to the Supreme Court for a writ of review the first judgment of this court became final and the matter was res judicata. Yet my colleagues would now make an award to plaintiffs for removal of the lake.

The only item of damages which were reserved to plaintiffs by this court, and which an attempt was made to prove at the latest trial, is the claim for damages based on alleged erosion of plaintiffs' remaining land over the years since the suit was originally filed and the amount claimed to make the remaining property safe and secure. Apparently, plaintiffs did understand that this may be the result of the earlier opinions of this court because they did plead such damage and attempted to prove such. They are not entitled to recover this item, not because of res judicata since this claim was available to them under the reservation given to them by this court, but because the evidence does not support their claim.

I cannot agree with my colleagues who would award plaintiffs the value of their property as of the time of the trespass subject to the credit for the amount awarded by this court in the first case. The very issue before the court in the first case was plaintiffs' right to recover for the value of the property taken, and this court held that plaintiffs were not entitled to recover on this theory. They specifically limited plaintiffs' recovery to the value of the dirt and place as opposed to the value of the property which had been taken, and yet my colleagues would now make an award to plaintiffs based upon what plaintiffs could have purchased a similar piece of property for just after the trespass was committed. This seems inconsistent with the original case before this court and such relief would seem to be likewise precluded under the doctrine of res judicata.

Accordingly, I respectfully dissent from the decree and the opinions of my colleagues.

APPENDIX 3

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

MRS. VIOLET M. DERBOFEN, Wife of GAIL T. KREHER, and MRS. FLORENCE JUNCKER, Widow of DR. JOHN C. DERBOFEN,

NO. 417-884
versus Division "D"
Docket: 4

T. L. JAMES & COMPANY, INC., Et al

JUDGMENT

The above entitled and numbered cause came on for trial on the 25th of November, 1975, and was taken under advisement by the Court.

PRESENT:

JOHN M. MAMOULIDES, Esq.,
attorney for plaintiffs,

PAUL E. HURLEY, Esq.,
attorney for defendant,
T. L. James & Co., Inc.

WHEN, After hearing the pleadings, the evidence and the argument of counsel, the Court, after having taken the matter under advisement for further consideration and adjudication, after considering the law and the testimony and other evidence adduced, for the written reasons this day handed down:

IT IS ORDERED, ADJUDGED AND DECREED That there be Judgment herein in favor of plaintiffs, MRS. VIOLET M. DERBOFEN, Wife of Gail T. Kreher, and MRS. FLORENCE JUNCKER, Widow of DR. JOHN C. DERBOFEN, and against the defendant, T. L. JAMES & COMPANY, INC., in the sum of ONE HUNDRED EIGHTY-THREE THOUSAND ONE HUNDRED TWELVE and 30/100 ($183,112.30) Dollars, together with legal interest from date of this Judgment, and for all costs of these proceedings.

JUDGMENT RENDERED AND SIGNED on this 13th day of January, 1975.

/s/ S. SANFORD LEVY
Judge

REASONS FOR JUDGMENT

(Number and Title Omitted)

On October 30, 1958, Mrs. Florence Juncker, widow of Dr. John C. Derbofen, and Mrs. Violet M. Derbofen, wife of Gail T. Kreher, instituted suit against T. L. James and Company, Inc., and others. (See suit No. 366-261 of the Civil District Court). In that suit the plaintiffs claimed to be the owners of a five acre tract of land (therein and hereafter designated as "Grove 57"). The property is located in the Third District of New Orleans, in that section of New Orleans now referred to as "New Orleans East" and more particularly as "Lake Forest Subdivision." Mrs. Kreher is the

daughter of Mrs. Violet M. Derbofen, the latter being the owner of one-half of the property, with the usufruct of the other one-half, owned by her said daughter.

In that suit plaintiffs claimed damages of T. L. James and others for the removal of 245,000 cubic yards of "soil, sand, clay, mud, etc.," and the "destruction of vegetation and trees and depriving petitioners of full use and enjoyment of premises to date."

Without detailing the history of the lengthy proceedings, suffice it is to say that the matter was submitted on June 1, 1960, and Judgment rendered on the 26th day of January, 1962. In that Judgment all parties other than T. L. James and Company, Inc., were dismissed and Judgment rendered against T. L. James and Company, Inc. for $6,044.00. The Judgment held that "The sole question at issue is the quantum of damages to be awarded, and that where, as in this case, *the cost of restoration exceeds the value of the property injured,* the measure of damages is the difference in market value of the property as a whole before and after the injury * * * *" (Emphasis by the Court).

An appeal was taken from the Judgment, and on December 3, 1962, the Judgment was amended and affirmed. The Fourth Circuit Court of Appeal, in its Judgment, noted that "plaintiff's petition simply asks for monetary damages as itemized *but reserved the right to claim future damages for the continuing trespass,*" and that

> "The plaintiffs, in addition to reserving their right to claim future damages for the continuing trespass, as set forth, also pray that the defendants *be required to remove the water standing on their property and reserve the right to claim damages for indemnification of necessary expenses to be incurred on account thereof* in the event the defendants failed to do so. They have set no monetary value on this and pray for none." (Emphasis by this Court).

In the Judgment, the Fourth Circuit Court held that:

> "For the reasons assigned, the Judgment of the lower Court is amended by increasing the award to plaintiffs to $16,005.00, and by *further reserving plaintiffs' right to sue for future damages as prayed for in their petition, in all other respects the Judgment is affirmed.*" (Emphasis by this Court).

On December 2, 1963, Mrs. Derbofen Kreher and her mother instituted the within proceedings against T. L. James Company, Inc., and others. All parties, other than T. L. James Company, Inc., were dismissed from the proceedings after filing of exceptions.

On January 7, 1964, T. L. James and Company, Inc., filed exceptions to plaintiffs' petition on the grounds that all issues had been determined by the prior proceedings (i.e., Suit No. 366-261), and that the petition did not disclose a cause of action. This exception was overruled by the Court on January 31, 1964.

On March 4, 1964, T. L. James and Company, Inc., filed other exceptions — Prescription, Res Judicata

and No Cause of Action. The exception of prescription was maintained on July 24, 1970, and an appeal from the Judgment maintaining the exception was filed on December 22, 1970. T. L. James and Company, Inc., urged the appellate Court to affirm the Judgment of the lower Court maintaining the exception of prescription, and also contended that the previously overruled exceptions of no cause of action, judicial estoppel and res judicata also should have been maintained.

After a full review of the matter, the Fourth Circuit Court of Appeal, on March 13, 1973, reversed the lower Court's Judgment dismissing the case on the exception of prescription, and maintained the lower Court's Judgment in which it overruled the other exceptions of no cause of action, etc. A re-hearing was applied for and refused.

On December 21, 1968, a motion was filed to substitute parties-plaintiff, the original plaintiff, Mrs. Florence Juncker, widow of Dr. John C. Derbofen, alleging that she disposed of her half interest and usufruct on the other half to her daughter, Mrs. Gail T. Kreher and her husband, Gail T. Kreher.

Both, plaintiffs and defendant, filed motions for Summary Judgment which the Court denied, and the matter was then set for trial.

Defendant contended that inasmuch as Mr. Kreher was, and is, a member of the Bar he was barred from purchasing the rights of his vendor in this litigation. Upon plaintiffs' agreement to amend and bring Mrs.

Derbofen back into the suit as plaintiff, the matter proceeded to trial.

Defendant contends that plaintiffs are precluded from re-litigating the question of damages as measured by the cost of refilling the property under the doctrines of res judicata, judicial estoppel and division of a cause of action. It is the opinion of the Court that there is merit to defendant's contention inasmuch as the Court of Appeal, while reserving plaintiffs' right to sue for damages "as prayed for in their petition," did award damages for the mud, etc., removed, and if the area now under water was refilled it would have the effect of permitting plaintiffs to make double recovery.

However, the Court is of the opinion that plaintiff does have the right to damages for the trespass and "as prayed for in their (original) petition" inasmuch as these rights were especially reserved to them by the Court of Appeal as set forth hereinabove.

The sole question for determination, in the Court's opinion, is the method to be used in determining the damages and the quantum of such damages.

Testimony has been adduced with reference to the matter of removing the water from the area of Grove 57, now forming part of the Lake, so that Grove 57 would be restored to its original posture. The Court rejects this method for the reason that while the Court is satisfied that plaintiffs should be fully reimbursed for damages which they have suffered by the trespass, the cost of removing the water would be so great (many,

many times the value of the entire Grove) that any Judgment for such sum would be punitive and would not be justified under all of the circumstances surrounding this litigation.[1]

The Court is of the opinion that the damages should be the value of that portion of the land which, in effect, has been taken away from plaintiffs and made valueless by the actions of the defendant's trespass. Further, there is no question but that this trespass (tort) has been a continuing one, inasmuch as that portion of Grove 57, now under water, has been in continuous use and forms a corridor between those bodies of water on each side of that portion of Grove 57 which belonged to plaintiffs.

The testimony adduced during the trial of this matter has satisfied the Court that land in the area has a value of $1.88 a square foot, and this would be the value of the land forming Grove 57 if the water was removed and the area filled in with mud.

Defendant's counsel contends that damages should be measured as of the date of the commission of the tort, but, as set forth above, the tort has been a continuing one and continues to exist to this date, hence the damages must be measured as of the date of trial. For the same reason the Court feels that interest should only be assessed from date of the Judgment.

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1 Defendant's counsel's argument — that plaintiff should have used the $16,000.00 which was awarded by the Court of Appeal as compensation for the removal of the soil to fill the excavation — borders on the absurd when considered in the light of the testimony as to the cost of removing the water and filling in that part of Grove 57 with other soil.

According to all of the plans introduced in evidence (See Exhibits 14-15) that area from which mud was taken, and now under water and forming part of Grove 57, measures 2.236 acres. Using the figure of 43,560 square feet per acre, the area consists of 97,400.160 square feet. At $1.88 a square foot the acreage has a value of $183,112.30, and it is the Court's opinion that Judgment should be awarded to plaintiffs and against defendant for that sum, together with interest from date of this Judgment until paid and for all costs of these proceedings.

New Orleans, Louisiana,
on this 13th day of
December, 1974.

/s/ S. SANFORD LEVY
JUDGE

APPENDIX 4

PETITION

(Number and Title Omitted)

Filed: Dec. 2, 1963 /s/ A. COPELAND
Deputy Clerk

TO THE HONORABLE, THE JUDGES OF THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA:

The petition of Mrs. Violet M. Derbofen, wife of Gail T. Kreher, and Mrs. Florence Juncker, widow of Dr. John C. Derbofen, both of lawful age and residents of and domiciled in the Parish of Orleans, State of Louisiana, with respect shows the Court:

I

That T. L. James & Company, Inc., defendant herein, is a corporation organized under the laws of Louisiana, and is domiciled in Ruston, Louisiana.

II

That Joe W. Brown, died in the City of New Orleans on the 15th day of February, 1959, and that the Succession of Joe W. Brown has been opened in the Civil District Court for the Parish of Orleans, in Proceeding No. 368,953 of this Court and is now open and before this Court, and that the said estate of Joe W. Brown is a defendant herein.

III

That on the 20th day of February, 1959, by Judgment of this Court, rendered and signed in the Succession of Joe W. Brown, Mrs. Dorothy Dorsett Brown, widow of Joe W. Brown, was recognized and appointed as testamentary executrix of said Succession.

IV

That Mrs. Dorothy Dorsett Brown, widow of Joe W. Brown, defendant herein, individually, and as

testamentary executrix of the Succession of Joe W. Brown, is of lawful age and a resident of the Parish of Orleans, State of Louisiana.

V

That George Dallas Williams, defendant herein, is of lawful age and a resident of the Parish of Orleans, State of Louisiana.

VI

That Sabine Dredging and Construction Co., Inc., made defendant herein, is a foreign corporation organized under the Laws of Texas and is authorized to do business in the State of Louisiana, and was authorized to do business by the Secretary of the State of Louisiana on July 24, 1958.

VII

That T. M. Dorsett, defendant herein, is of lawful age and a resident of St. Bernard Parish, State of Louisiana.

VIII

That the defendants are indebted individually and insolido to your petitioners in the sum of Four Hundred Seventy-Six Thousand and no/100 ($476,000.00) Dollars, hereinafter itemized and for the reasons alleged herein.

IX

That Plaintiff, Mrs. Florence Juncker, widow of Dr. John C. Derbofen, as surviving spouse in community and usufructuary, and co-Plaintiff, Mrs. Violet M. Derbofen, wife of Gail T. Kreher, as sole surviving heir and naked owner, are each the absolute and uncontested owners of an undivided one-half interest respectively in and to the tract of ground hereinafter referred to simply as GROVE 57 being:

> A CERTAIN PORTION OF LAND, together with the buildings and improvements thereon, rights, ways, and privileges thereunto belonging, or in any wise appertaining, situated in the Third District of this City, designated as Grove 57 in Section 25 of New Orleans Lake Shore Land Company Tracts, according to the official map of said tracts on file in the office of E. K. Leverich, Notary Public, under date of December 11, 1918. As will more fully show by the judgment of possession rendered and dated May 9, 1935, in the Succession of Dr. John C. Derbofen, and duly recorded in C.O.B. 481, folio 470, of the records of the Register of Conveyances of the Parish of Orleans, State of Louisiana.

X

That in mid January of the year 1958, and not before, petitioners were informed that excavation had been made from petitioners' said property, creating a borrow pit to the extent of 2.232 acres of said five acre tract.

XI

Petitioners are informed and believe, and therefore allege upon such information and belief, that the Succession of Joe W. Brown, defendant herein, is the owner of Groves Nos. 35 - 37 - 39 - 41 - 43 - 45 - 47 - 49 - 51 - 53 - 55 and 59 of Section 25 of the "New Orleans Lakeshore Land Company Tract" located in the Third District of the City of New Orleans, State of Louisiana, bordering petitioners property on two sides.

XII

Petitioners filed suit on October 30, 1958, to recover the value of soil taken, and for reservation of certain rights, hereinafter more fully referred to in detail, said proceedings were numbered 366,261, Division "G", of the Civil District Court of the Parish of Orleans and petitioners were awarded a judgment from which petitioners appealed.

XIII

Petitioners are informed, believe, and therefore allege upon such information and belief that 84,025 cubic yards of earth were removed from their property without their knowledge, permission or consent, by defendants herein and/or their agents causing the continuing tresspass to petitioners' property complained of herein, all to the detriment and damage of petitioners.

XIV

In petitioners' petition in Civil District Court, proceeding No. 366,261, Division "G", petitioners reserved their right to sue for future damages and the continuing trespass as set forth therein, and that a copy of said petition is attached hereto and made part hereof, as if copied herein in extenso.

XV

Petitioners appealed this Civil District Court decision to the Court of Appeal, Fourth Circuit, State of Louisiana, No. 824, entitled "Mrs. Florence Juncker, widow of Dr. John C. Derbofen and Mrs. Violet M. Derbofen, wife of Gail T. Kreher, Plaintiffs and Appellants, versus T. L. James & Company, Inc., Joe W. Brown, George Dallas Williams and T. M. Dorsett, Defendants and Appellees", and that the judgment of the Lower Court was amended by increasing the award to plaintiffs and by further reserving plaintiffs right to sue for future damages as prayed for in their petition, and a correct copy of said decision of the Court of Appeal of Louisiana, Fourth Circuit, No. 824, (148 So. 2d. 795) is attached hereto and made part hereof, as if copied herein in extenso.

XVI

Petitioners are informed, believe, and therefore allege upon such information and belief that during the years 1955, 1956, 1957, there was a series of transactions between T. L. James & Company, Inc. and the late Joe W. Brown, in which T. L. James & Company, Inc.

contracted with Brown to build him a lake on property adjoining that owned by plaintiffs, and in fact did build such a private artificial lake to suit his requirements.

XVII

Petitioners are informed, believe, and therefore allege upon such information and belief that at this approximate time T. L. James & Company, Inc. was performing a contract with the Department of Highways of the State of Louisiana (State Project 419-01-01; Orleans Parish) by building a highway in close proximity to the property of plaintiffs and the late Joe W. Brown. A quantity of dirt or borrow material to be used as fill in building this highway was required.

XVIII

Petitioners are informed, believe, and therefore allege upon such information and belief that in the process of removing the dirt from the property of the late Joe W. Brown to the highway fill, defendant Sabine Dredging and Construction Co., Inc., acting under a subcontract with defendant, T. L. James & Company, Inc., used a dredge to remove the dirt from the property. The Sabine Dredging and Construction Co., Inc., during said dredging operations encroached upon the property of plaintiff and dredged a section through the center of their property, Grove 57, which incidentally contains five (5) acres, and continued to excavate and remove dirt to the extent that 2.232 acres of the said five (5) acre tract is now covered with water and that 84,025 cubic yards of borrow material was removed from plaintiffs' property without their knowledge or consent.

XIX

Petitioners are informed, believe, and therefore allege upon such information and belief that 4,000 cubic yards of this dirt, which is referred to as the humus, were delivered to the late Joe W. Brown as a part of the consideration for the transaction between him and defendant, T. L. James & Company, Inc., whereby T. L. James & Company, Inc., was to build him an oval shaped lake containing a stated number of acres and that as a further consideration there was an exchange of lots at the rate of three (3) lots for two (2) lots in the area between T. L. James & Company, Inc. and the late Joe W. Brown. The remainder of the dirt was used as fill for the highway.

XX

The legal liability of the defendant T. L. James & Company, Inc. for trespass to petitioners' property described herein has been established as a matter of fact by the Court in Civil District Court proceeding No. 366,261, Orleans Parish, Louisiana, and affirmed on appeal by the Fourth Circuit Court of Appeal of Louisiana, which said decision of the Appellate Court further reserved to petitioners their right to claim damages for indemnification and for continuing trespass in the event that the said defendants failed to remove the water standing on petitioners' property which as of the date of filing this petition defendants have failed to do.

XXI

Petitioners are informed, believe, and therefore allege upon such information and belief that petitioners still own a rectangular tract of land known as Grove 57, measuring 168.20 feet by 1294.86 feet and that the contour has been radically changed by the actions of one or more of the defendants, in that whereas it was level before the dirt was removed, it is now cut in half and approximately 683.04 feet by 168.20 feet and the center of the tract is covered by a lake measuring in some places up to a depth of thirty-five (35') feet.

XXII

Petitioners are informed, believe, and therefore allege upon such information and belief that on over 2.236 acres of petitioners' property there is left standing a deep body of water which is not contained, protected, nor enclosed, constituting a hazard to the safety of petitioners and to the public, being a nuisance and causing further erosion of soil from petitioners' land, and making establishment of boundaries on part of petitioners' land a virtual impossibility, and that said trespass is continuing at the present time, depriving petitioners of their right to use and enjoy their property and making a portion thereof inaccessable.

XXIII

Petitioners are informed, believe, and therefore allege upon such information and belief that on December 23, 1957, 2.232 acres of their property was

under water, and that on February 9, 1959, 2.236 acres of their property was under water and that the total amount of water on petitioners' property is approximately 14,830,354 gallons, and further that the angle of repose of the lake banks is almost a perpendicular drop off of 25 to 30 feet in depth and wave action from the water in the thirty (30) odd acre lake to the north of petitioners' property causes constant erosion and crumbling of petitioners' land, inundating a greater portion of their land, as long as this continuing trespass continues in existence.

XXIV

Petitioners are informed, believe, and therefore allege upon such information and belief that the continuing trespass as set forth above is causing to be established, against the will of petitioners a servitude of drain across their property which once established will become permanent to petitioners detriment and loss, and that the only way to remove the servitude existing is to restore the original contour of their tract, Grove 57 by removing the water standing thereon and by filling the area under water with a suitable material, protecting boundaries fronting on lake of adjoining owner Brown with sheet piling.

XXV

Petitioners are informed, believe, and therefore allege upon such information and belief that in order to remove the existing servitude of drain, render and make petitioners' property safe and secure from future damage, and to remove the water standing

thereon and remove the continuing trespass as set forth above it will be necessary to restore the original contour of the tract by driving sheet piling along the boundaries of the adjoining owner's lake and to fill in the portion now under water with a solid material suitable to the area involved.

XXVI

Petitioners are informed, believe, and therefore allege upon such information and belief that they have been damaged by the continuing trespass as set forth and claim damages for indemnification for necessary expenses to be incurred on account thereof, as follows:

1)	Removal of water from petitioners' property and restoring original contour of tract by filling area now under water with suitable material, protecting boundaries fronting on lake owned by adjoining owner Brown with sheet piling.	$410,000.00
2)	10% for engineering and contingencies.	41,000.00
3)	Depriving petitioners of full use and enjoyment of premises to-date.	25,000.00
	TOTAL	$476,000.00

WHEREFORE, petitioners pray that T. L. James & Company, Inc., The Succession of Joe W. Brown, No. 368,952, Civil District Court, Orleans Parish, Loui-

siana, Mrs. Dorothy Dorsett Brown, individually and as testamentary executrix of the Succession of Joe W. Brown, George Dallas Williams, Sabine Dredging and Construction Co., Inc., and T. M. Dorsett, be duly cited to appear and answer this petition, and that they each be served with a copy of same, and that after due proceedings had, there be judgment in favor of petitioners and against the said defendants, individually and insolido, in the sum of Four Hundred Seventy-Six Thousand and no/100 ($476,000.00) Dollars, with legal interest from judicial demand, and for all orders and decrees that may be necessary in the premises; for all costs; and for all general and equitable relief that may be appropriate in the premises.

/s/ GAIL T. KREHER
GAIL T. KREHER,
6666 Argonne Boulevard,
New Orleans, Louisiana

Attorney for Petitioners

SERVE DEFENDANTS:

T. L. James & Co., Inc., Ruston, Louisiana,
through James C. Love or
Gerald I. Dyson designated agent.

Succession of Joe W. Brown, Mrs. Dorothy Dorsett Brown,
Testamentary Executrix, Estate of Joe W. Brown,
Pere Marquette Building, New Orleans, Louisiana

Mrs. Dorothy Dorsett Brown,
5400 Bancroft Drive,
New Orleans, Louisiana

George D. Williams,
370 Bellaire Drive,
New Orleans, Louisiana

Sabine Dredging and Construction Co., Inc.,
through L. C. Gibbs, designated agent,
130 Elvis Court, Metairie, Louisiana

T. M. Dorsett,
% The Estate of Joe W. Brown,
Pere Marquette Building,
New Orleans, Louisiana

APPENDIX 5

Mrs. Florence JUNCKER, Widow of Dr. John C. DERBOFEN, and Mrs. Violet M. Derbofen, Wife of Gail T. Kreher

versus

T. L. JAMES & COMPANY, Inc.; Joe W. Brown; George Dallas Williams; and T. M. Dorsett.

No. 824.

Court of Appeal of Louisiana.

Fourth Circuit.

Dec. 3, 1962.

Rehearing Denied Feb. 4, 1963.

Before REGAN, SAMUEL and TURNER, JJ.

HENRY F. TURNER, Judge pro tem.

In this case the plaintiffs, alleging themselves to be the owners of a tract of land described as:

> A CERTAIN PORTION OF LAND, together with the buildings and improvements thereon, rights, ways and privileges thereunto belonging, or in any wise appertaining, situated in the Third District of this City, designated as

> Grove 57 in Section 25 of New Orleans Lake Shore Land Company Tracts, according to the official map of said tracts on file in the office of E. K. Leverich, Notary Public, under date of December 11, 1918.

seek damages from the defendants in the amount of $519,500. They allege that the defendants, T. L. James & Company, Inc., Joe W. Brown, George Dallas Williams, and T. M. Dorsett, engaged in a joint venture, unlawfully removed from their property 245,000 cubic yards of soil, sand, clay, mud, etc., valued at $2 per cubic yard or $490,000. They allege that the defendants destroyed vegetation and trees valued at $4,500 and that plaintiffs had been deprived of their full use and enjoyment of the premises to the date of filing of suit in the amount of $25,000. The record shows a series of transactions between the defendant, T. L. James & Company, Inc., and the defendant, Joe W. Brown, in which T. L. James & Company, Inc., contracted with Brown to build him a lake on property adjoining that owned by the plaintiffs. They allege that at this approximate time T. L. James & Company, Inc., was performing a contract with the Department of Highways of the State of Louisiana by building a highway in close proximity to the property of the plaintiffs and defendants Joe W. Brown and T. L. James & Company, Inc. A quantity of dirt to be used as fill in building this highway was required. In the process of removing the dirt from the property of Joe W. Brown to the fill, the Sabine Dredging & Construction Co., Inc., used a dredge to remove the dirt from the property; it was acting under a sub-contract with the defendant, T. L. James & Company, Inc., and was subsequently, by

supplemental and amended petition, made a codefendant. The plaintiffs' petition alleges that the Sabine Dredging & Construction Co., Inc., encroached upon their property and dredged a section through the center of their property, Grove 57, which, incidentally, contains 5 acres, and continued to excavate and remove dirt to the extent that 2.232 acres of the said 5-acre tract was covered with water. Defendants' answer merely places plaintiffs on proof and sets up contributory negligence as a bar to plaintiffs' cause of action, alleging such negligence on plaintiffs' part to be the failure to cause their boundaries to be established and marked. They further answered averring that if there was any dirt removed which belonged to plaintiffs, it was an inadvertent and unintentional act and further that the dirt, if taken, was used solely for the public and beneficial purpose of erecting said state highway.

After a trial of the case, the district court found that the plaintiffs failed to prove any conspiracy between the defendants and dismissed the suit against all of them except T. L. James & Company, Inc. The judge assigned no written reasons for judgment other than those contained in the judgment which read as follows:

> "* * * the sole question at issue is the quantum of damages to be awarded, and that where, as in this case, the cost of restoration exceeds the value of the property injured, the measure of damages is the difference in the market value of the property as a whole before and after the injury, and for the further reasons this day orally assigned:"

He then gave judgment for the plaintiffs against defendant, T. L. James & Company, Inc., in the full sum of $6,044, with interest and costs. The plaintiffs have appealed from this judgment.

The facts in this case show that the plaintiffs had owned this property for a number of years and that it was unimproved. The property had no trees or vegetation growing thereon, nor any improvements of any kind for that matter. By stipulation between counsel it was agreed that T. L. James & Company, Inc., in fact took 80,025 cubic yards of dirt from plaintiffs' property and that no amount of money had been paid nor tendered plaintiffs for this dirt. The facts further show that 4,000 cubic yards of this dirt, which is referred to as the humus, were delivered to Joe W. Brown as a part of the consideration for the transaction between him and defendant, T. L. James & Company, Inc., whereby T. L. James & Company, Inc., was to build him an oval-shaped lake containing a stated number of acres and that as a further consideration there was an exchange of lots at the rate of 3 lots for 2 lots in the area between these two defendants. The remainder of the dirt was used as fill for the highway. The evidence further shows that overtures had been made by one or more of these defendants, through their agents or realtors at their request, to try to purchase the property from the plaintiffs who declined to sell their 5 acres in Grove 57 at any price. There is some evidence to the effect that the defendants were willing to pay $25,000 and possibly more for the property, but their offers were rejected. Further evidence in the case shows that there was property in the immediate area that had been sold for as high as $4,500 per acre.

It is to be noted that in plaintiffs' petition they simply ask for monetary damages as itemized but reserved the right to claim future damages for the continuing trespass. The plaintiffs have not asked for damages to the property in this case. Their damages by reason of the unlawful taking and removing from their property are itemized as: first, the removal of the dirt; second, the destruction of vegetation and trees; third, deprivation of the full use and enjoyment of the premises to date. The evidence in the case does not support the judgment for any amount on account of the last two items. That brings us to a consideration of the value of the dirt removed by T. L. James & Company, Inc.

Although there is evidence in the case to justify plaintiffs' suspicion of the conspiracy between the defendants to obtain their property, the trial court found none, and we find no manifest error in his adjudication on that score and consequently will not disturb same.

We think under the pleadings in this case that the trial court, however, erred in using market value as the criterion for assessing damages sought in this case. It will be noted that the plaintiffs in addition to reserving their rights to claim future damages for the continuing trespass, as set forth, also pray that the defendants be required to remove the water standing on their property and reserve their right to claim damages for indemnification of necessary expenses to be incurred on account thereof in the event the defendants failed to do so. They have set no monetary value on this and pray for none. (Emphasis added)

The trial court apparently tried and decided this case as though it were an expropriation case. He apparently used the formula found in the last paragraph of the appraisal report of realtor Kuebel which reads as follows:

> "It is the further opinion of your appraiser that if the rights of ownership from the lake were taken away from the two remaining parcels that each parcel would suffer a loss in value of $1000.00. In other words, the two remaining parcels would be worth $5,728.00 each or $11,456.00 or $4,140.00 per acre."

It will be noted that the figure of $11,456 subtracted from the market value of October 8, 1958, of $17,500 in the preceding paragraph, comes to the exact figure awarded by the district judge.

We do not think the facts in the record justify this assumption. The plaintiffs in the case do not allege that they have been deprived of one foot of their property. The survey on the ground or the plat shown on an ownership map will show they still own a rectangular tract of land known as Grove 57, measuring 168.20 feet by 1294.86 feet. Of course the contour has been radically changed by the actions of the defendant in that, whereas it was level before the dirt was removed, it now is cut in half and 683.04 feet x 168.20 feet in the center of the tract is covered by a lake measuring in some places up to a depth of 35 feet. Plaintiffs have not asked for severance damages nor have they asked for damages by reason of a diminution in value of their property. They have simply asked for pay for their dirt

and that we enjoin the defendants to remove the water standing on their property. They have asked for no alternative moneyed judgment for this. They have, as we have stated, reserved their rights to claim future damages, but as the case now stands, and as we see it, the only item of damages we can consider is the value of the dirt in place on plaintiffs' property at the time it was removed. Evidence in the case shows that the defendant, T. L. James & Company, Inc., collected from the Highway Department $1.50 per cubic yard for the dirt delivered to and placed in the fill on the right of way upon which the highway was being constructed.

Counsel for defendant argue that there cannot be two separate estates, one of the land and the other of the soil. They say the law does not permit same. They concede, however, that shells, sand, gravel, coal, and other minerals are severable and are articles of commerce. We think that they could well have added to those commodities mud, humus, top soil, leaf mould, and other forms of dirt sold and used to improve lawns, flower gardens, vegetable gardens, etc. We know of some large corporations whose business is exclusively that of selling mud and others which sell sand, leaf mould, top soil, sod, and other types of dirt used to improve and make flower beds, etc. The courts have recognized the severability of dirt in cases wherein they have allowed for the cost of ordinary dirt taken from the owner's land as opposed to damages by reason of the taking. Hebert v. T. L. James & Co., La. App., 72 So.2d 754.

In the present case there is testimony in the record that dirt was stockpiled at or near Kenner and was for

sale at 10 cents per cubic yard. Of course, this is a commodity of commerce subject to barter and sale, entirely separate and apart from the owner's lot on which he happens to stockpile the commodity.

In expropriation or condemnation proceedings, market value is a fair criterion for the fixing of compensation for damages for a taking of property. It is the price which would be agreed upon at a voluntary sale between a willing seller and purchaser taking into consideration all the available uses for the land. Of course, this contemplates parties dealing at arm's length, and each has a right to decline or accept an offer to sell or buy. In the present case the evidence shows that there was never a willing seller. In fact it was practically a year after the taking before the plaintiffs discovered their loss, during which time overtures were being made by at least some of the defendants through realtors interposed to purchase the property, which offers were rejected.

The fact that the dirt at issue in this case eventually became the fill of the Highway Department for a public use does not in our opinion bring this case within the eminent domain cases. In fact although plaintiffs seem to make no distinction between the humus and the dirt as to value, the record shows that 4,000 cubic yards of this dirt went to the property of Joe W. Brown, defendant, and was not used on a public project. T. L. James & Company, Inc., simply went on the dirt market and bought some dirt in the same manner that they would have bought shell and cement except they failed to consult or obtain the permission of these plaintiffs to use their dirt and have never paid them for

same. T. L. James & Company, Inc., could have used this dirt on any number of private projects had they chosen to do so. The mere fact that it was conveniently located to the fill required is the reason that they used this land rather than haul it from some less-favored location. The evidence in the case as to the value of the dirt taken by defendant is not very satisfactory. One witness testified that dirt stockpiled near Kenner, some 12 to 15 miles from this place, could have been bought at 10 cents per cubic yard. Counsel for T. L. James & Company, Inc., stated that although James & Co. sold the dirt at $1.50 per cubic yard to the Louisiana State Highway Department and delivered in place their fill that they only netted 15 cents per cubic yard. If we permitted the judgment of the lower court in the amount of $6,044 to stand, this would mean that the defendant, T. L. James & Company, Inc., would be enriched to the tune of $6,000 by its own negligence and wrongdoing. In our opinion it would be a desecration of all rules of equity to permit an unjust enrichment of this kind. To permit defendant, James & Co., a private corporation, to go upon a person's property without any right to take therefrom that person's valuable property and sell it at a profit to itself and retain the money is certainly contrary to all rules of equity and justice. This would be particularly true where the wrongdoer had previously, without success, attempted to obtain the property.

We find an old case decided in 1931, during the depression, in which the Court upheld an award of 25 cents per cubic yard, plus one cent per cubic yard for each additional 100 feet over 500 feet, for the unlawful taking of dirt from plaintiff's property without

authority. Booth v. Louisiana Highway Commission et al., 171 La. 1096, 133 So. 169. In this case they cited an older case where the Court allowed 75 cents per cubic yard for earth taken from the plaintiff's property. Of course the facts in those cases may be entirely different from the facts in the case at bar, and would not set a criterion for fixing a value on dirt.

The authorities as to the value of dirt taken from a person's property are rather meager, but by analogy to the cases on cutting and taking of timber from a person's property, we think it fair to apply the rule of good faith and bad faith. In this case the trial judge, having found that the defendant was in good faith, and we, having subscribed to that finding, do not feel that we can justifiably assess the value of the dirt delivered to the fill at $1.50, which, we might say, is the manufactured state of the dirt as compared to the manufactured timber for which trespass in bad faith is assessed, as opposed to the dirt in place as compared to the stumpage value of timber in the timber cases.

We are referred to several cases, notably State of Louisiana Through Department of Highways v. Glassell, 226 La. 988, 77 So.2d 881, wherein the Supreme Court affirmed the lower court's allowance for full acreage price for a borrow pit. All those were expropriation cases where the defendant's property was either taken or damaged, and the Court felt that giving the value of property taken would certainly exceed the amount allowed for taking a portion of the property or damaging the property. Again the defendants had no alternative but to accept the price eventually awarded for the property, those being condemnation proceedings.

To bring this case under Article I, Section 2 of the Constitution, LSA, we would have to find that the taking of plaintiffs' property was appropriated for public purposes intentionally and purposefully. Angelle v. State, 212 La. 1069, 34 So.2d 321, 2 A.L.R.2d 666, and cases cited therein. Defendants negative any contention that the taking was purposeful or intentional; on the contrary, they affirmatively allege and attempt to prove that the taking was inadvertent and unintentional.

We think, however, that the plaintiffs should be adequately compensated for the dirt and have arrived at a figure of 20 cents per cubic yard or a total of $16,005. If defendant made 15 cents per cubic yard on his dirt legally taken, it seems fair to add 5 cents for dirt which plaintiffs had refused to sell.

The only defense is one of contributory negligence which we consider frivolous. Defendant claims that because plaintiffs did not erect monuments, fences, signs, billboards or walls around their property that they were negligent to the extent that they should be barred from collecting damages for their trespass and wrongdoing. Defendant has cited no rule of law nor case to support such a contention and we doubt that he can do so. Using his same argument, had he properly marked the bounds of his property, as he seems to imply there is a legal duty to do, then the captain of the dredge in charge of the excavation and removal of the dirt would have known to stop at defendant's boundary where marked.

For the reasons assigned, the judgment of the lower court is amended by increasing the award to plaintiffs to $16,005, **and by further reserving plaintiffs' right to sue for future damages as prayed for in their petition;** in all other respects the judgment is affirmed. (Emphasis added)

Amended and affirmed.

APPENDIX 6

SUPREME COURT OF THE UNITED STATES

NO. A-79

VIOLET M. DERBOFEN, ET AL.,
Petitioners,

versus

T. L. JAMES & CO., INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 18, 1978.

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 19th
day of July, 1978.

APPENDIX 7